ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CACR 06-615

MAY 9, 2007

CHIKUENG FORD APPELLANT	APPEAL FROM THE UNION COUNTY CIRCUIT COURT [NO. CR-2005-0109-4]
V.	HONORABLE CAROL CRAFTON ANTHONY, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant Chikueng Ford pleaded guilty to two counts of delivery of methamphetamine, one count of possession of cocaine with intent to deliver, one count of possession of methamphetamine with intent to deliver, one count of possession of drug paraphernalia, and one count of maintaining a drug premises. After a sentencing hearing, the jury sentenced Mr. Ford to four twenty-year sentences and two six-year sentences, as well as an additional ten-year enhancement for selling controlled substances within 1000 feet of a city park.

The jury recommended that all of the terms of imprisonment be served consecutively, and the trial court accepted the jury's recommendation, sentencing Mr. Ford to consecutive sentences totaling 102 years in prison. Mr. Ford's sole argument on appeal is that the trial court erred in failing to exercise its discretion in deciding whether his sentences should run consecutively or concurrently. We affirm.

At the sentencing hearing, the State presented evidence that an informant and then a police officer made controlled methamphetamine buys from Mr. Ford at his residence on two separate occasions. The police subsequently obtained a search warrant, and a search of appellant's residence uncovered quantities of methamphetamine and cocaine, as well as digital scales and various other items of drug paraphernalia. Mr. Ford admitted to every offense with which he was charged, and acknowledged that he had been sentenced to prison twice before.

After the jury recommended consecutive sentences, the following colloquy ensued:

> TRIAL COURT: Is there any reason that the sentence should not be imposed at this time?
> APPELLANT'S COUNSEL: We would request that the court consider whether or not it would be appropriate for sentences to be concurrent and make a finding on that before he is sentenced.
> TRIAL COURT: Tell me why I shouldn't follow their recommendation.
> APPELLANT'S COUNSEL: Because the statute requires the court to make that decision.
> TRIAL COURT: Mr. Gillespie, the law allows them to recommend. Why should I not follow the recommendation once we ask for it?
> APPELLANT'S COUNSEL: As I said, Your Honor, the statute requires that you consider the circumstances and make a finding as to whether or not it would be appropriate for the sentences to run consecutive or concurrent.
> TRIAL COURT: Mr. Gillespie, you haven't answered my question yet. You haven't given me a reason or something for me to think about. Just telling me I have the discretion doesn't tell me anything new. What is your argument that I shouldn't follow it?
> APPELLANT'S COUNSEL: If the recommendation is followed that will be a sentence of one hundred and two years as I figure it up plus ten years of it would be without the possibility of reduction for good time or other consideration, it is a flat ten which would be the equivalent of another forty years.
> TRIAL COURT: That is the equivalent of thirty-three years. The twenty years are those which you could consider one-quarter, four or five year sentences if he get's good time, if he doesn't it's twenty. A year and one-half on each of the two six years, that's twenty-three and then the ten.
> APPELLANT'S COUNSEL: The ten is without parole.

TRIAL COURT: It is effectively a thirty-three year sentence.
APPELLANT'S COUNSEL: Thirty-three years to serve. Your Honor, it is a long sentence and it's far in excess of what the recommendations are by the sentencing commission and we would ask that the court . . .
TRIAL COURT: Do you have any kind of argument other than that? Is it in the range available?
APPELLANT'S COUNSEL: It's in the range available but we think it is an excessive sentence and we request the court to consider whether or not if the court believes that these sentences should run concurrent rather than accepting the jury's recommendation.
TRIAL COURT: So you would argue that the eleven year sentence is fair for these six charges? That's the difference.
APPELLANT'S COUNSEL: I haven't asked for eleven years sentence.
TRIAL COURT: If they are concurrent that's what it is. It is six and one-half on all six charges plus the ten.
APPELLANT'S COUNSEL: Certainly that would be within the range of what the sentences have been in the past on similar circumstances but I would not attempt to tell the court what the court ought to do. As far as the number of sentences I would ask you to consider making at least some of these cases run concurrent.
TRIAL COURT: What is your proposal?
APPELLANT'S COUNSEL: You Honor, I would propose that you would let the twenty year sentences run concurrent with each other and let the six years run consecutive with that and the ten years run consecutive also. It has to by law which would give him a lengthy sentence but not so long as when he come out with a long great beard down to his ankles.
TRIAL COURT: Ms. Harp?
PROSECUTING ATTORNEY: There's been no reason suggested why this court should not follow this jury's recommendation. They heard all the evidence in this case. Mr. Gillespie and Mr. Ford had every opportunity to present witnesses, anything by any type of deference and mitigation should be shown Mr. Ford. It's because of the State's position that he's a three time convicted felon, one of which was for delivery of cocaine, one was for felon in possession of a firearm. He was truly just running a candy store right there next to Maddox Park. He had everything available, powder cocaine, methamphetamine. The video has people coming in and out of there and this jury took the time determining what exactly it wanted to do, it sent out a note asking about his age and children and wife and all of that and of course none of that was in evidence. They were trying to draft a sentence that specifically expressed their values and their vision for what this community needs to be and there is just no reason not to follow it and it's exactly in line with every other sentence they've handed down.
TRIAL COURT: Actually, he's less, it's just that there were more charges.
PROSECUTING ATTORNEY: That's true.

TRIAL COURT: Anything else?
APPELLANT'S COUNSEL: That's all I have.
TRIAL COURT: Mr. Ford, come forward. Do you have anything you wish to say, Mr. Ford?
MR. FORD: I just think they should run concurrent. It's not like I was going to run or do anything like that. I accepted the plea. I wasn't scared to accept the fact of what I did was wrong. I admitted that before the trial.

. . . .

TRIAL COURT: Mr. Ford, the jury has returned the verdicts on the sentencing phase of this trial and on each of the six counts of which you are charged. It will be the order and the judgment of the court that you be sentenced to serve twenty years in the ADC on count one, twenty years on count two, twenty years on count three, six years on count four, twenty years on count five, and six years on count six. In addition the enhancement is ordered for ten years on the finding that you were within a thousand feet of a public or city park and the sentence will run consecutively as recommended.

Mr. Ford now argues that his sentences should be set aside because the trial court erred in failing to exercise its discretion in ordering the sentences to run consecutively. Arkansas Code Annotated section 5-4-403 (Repl. 2006) provides in relevant part:

> (a) When multiple sentences of imprisonment are imposed on a defendant convicted of more than one (1) offense, including an offense for which a previous suspension or probation has been revoked, the sentences shall run concurrently unless, upon recommendation of the jury or the court's own motion, the court orders the sentences to run consecutively.
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> . . . .
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> (d) The court is not bound by a recommendation of the jury concerning a sentencing option under this section.

Mr. Ford relies on *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980), where our supreme court held that although the criminal code vests the choice between concurrent and consecutive sentences in the judge, and not the jury, there must be an exercise of judgment

by the trial judge, and not a mechanical imposition of the same sentence in every case. In reversing the consecutive sentences in that case, the supreme court wrote:

> We commend the trial judge for his outspoken candor and would certainly condemn a resort to silence as a deliberate means of concealing an improper practice. But the trouble is, nothing in the colloquy indicates that the trial judge really exercised his discretion. Rather, he seems to have imposed consecutive sentences either because the defendant asked for a jury trial without any defense or because it was the court's rule to direct that jury sentences run consecutively. We have often said that a court proceeding should not merely be fair; it should also appear to be fair. Without implying in any way that the consecutive sentences are unwarranted, we find it best to remand the cause for resentencing.

Id. at 881, 606 S.W.2d at 595. Similarly, in *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985), we stated that in making the decision between concurrent and consecutive sentences, the trial judge should make it clear that it is his or her discretion being exercised when entering the sentences and not the jury's.

Mr. Ford contends that the trial judge's comments in this case made it evident that she was not exercising her discretion as required by law. In particular, Mr. Ford notes that the trial judge questioned his attorney more than once about why she should not implement the jury's recommendation. Instead of considering his counsel's arguments and exercising her judgment, Mr. Ford submits that the trial judge mechanically followed the jury's recommendation in ordering consecutive sentences. As such, Mr. Ford argues that this case should be remanded for resentencing.

The State argues in its brief that the issue on appeal is not preserved for review because Mr. Ford did not make a timely objection below. We disagree with this assertion because, during the sentencing hearing and before the trial court announced its ruling,

Mr. Ford specifically requested that some of his sentences run concurrently. However, we agree with the State's position that on the merits appellant's argument is not persuasive because the trial court did not fail to exercise its discretion in sentencing Mr. Ford to consecutive sentences.

We will not presume that the trial court did not exercise its discretion in ordering consecutive sentences unless there is some indication otherwise. *Urquhart v. State*, 273 Ark. 486, 621 S.W2d 218 (1981). Relying on our supreme court's holding in *Urquhart*, *supra*, we affirmed the appellant's consecutive sentences in *Blagg v. State*, 72 Ark. App. 32, 31 S.W.3d 872 (2000), stating:

> In *Acklin* and *Wing*, the trial judges made statements plainly indicating that they were not exercising their discretion. The instant case is distinguishable. First, the remarks by the trial judges in *Wing* and *Acklin* indicated that those judges not only failed to exercise their discretion in sentencing, but that they *routinely* failed to exercise their discretion in sentencing. By contrast, the trial judge in the instant case made no statements that can be construed to indicate that he did not intend to exercise his discretion in sentencing appellant, or that he routinely failed to do so. Indeed, the trial judge stated that the ultimate decision would be made by the court, thereby indicating his understanding that the jury's recommendation was purely advisory. Therefore, we hold that the trial judge did not fail to exercise his discretion in sentencing appellant and did not err in sentencing appellant to serve consecutive sentences.

Id. at 35-36, 31 S.W.3d at 874.

The present case is similar to *Blagg*, *supra*, in that the trial judge did not make statements reflecting that she was not exercising her discretion. While the trial judge did ask why she should not follow the jury's recommendation, she indicated her understanding of her discretionary role and that the jury's recommendation was merely advisory by stating to appellant's attorney, "Just telling me I have discretion doesn't tell me anything new." The

trial judge then heard the arguments presented by appellant's counsel and appellant himself, and thereafter decided to accept the jury's recommendation. At no time did the trial court indicate that it was mechanically following the jury's recommendation as argued by Mr. Ford. In *Teague v. State*, 328 Ark. 724, 946 S.W.2d 670 (1997), the supreme court held that the trial judge's statement that it was sentencing the defendant "in keeping with the verdict and recommendation of the jury" did not indicate the failure of the court to exercise discretion. Although the trial judge considered and accepted the jury's recommendation in the case at bar, it was within her authority to do so, and there was no indication that the judge's discretion was not properly exercised.

Affirmed.

HART and GLADWIN, JJ., agree.